IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8734 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

MEHBUB MUNNABHAI SHAIKH

Versus

COMMISSIONER OF POLICE

Appearance:

MR ANIL S DAVE for Petitioner

Mr. Kamal Mehta, AGP for Respondents.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 27/03/98

ORAL JUDGEMENT

The petitioner has been arrested and kept under detention passing the order of detention on 21st November 1997 invoking the powers under Section 3 of the Gujarat Prevention of Anti-Social Activities Act (for short "the Act"). By this application therefore the petitioner challenges the legality and validity of the order of detention.

2. The Commissioner of Police for the city of Ahmedabad had the information that by several criminal

activities the petitioner was disturbing the public order. He was considered to be the dangerous person by the public. He was extorting money and by coercive measures he used to cause the people to bend his way and those who refused were brutally dealt with. Every one was therefore either in private or in public place feeling insecured because of the fear of violence at any time. As every one was worrying about his own safety the Commissioner of Police examined different records of different police stations under him and found that in one complaint lodged with Gaekwad police station the petitioner was found to have committed the offences under Section 392, 323, 294 (b), 506 Part 2 read with Section 114, Indian Penal Code, Section 25 (1)(b) of the Arms Act and Section 135 (1) of the Bombay Police Act. It is alleged that at 21.30 hours on 9.6.97 the petitioner went to Jamalpur Darwaja with his compeers by a Maruti van and pointing the revolver while his compeers pointing gupti & knife threatened the complainant with injury or death. He then robbed the complainant forcibly taking out Rs. 11,700/- from his pocket. Another complaint was found to have been filed with Dani Limda police station with regard to the offences punishable under Section 324, 323, 504 read with Section 114 of the Indian Penal Code and Section 25 (1)(a) of the Arms Act alleging that the petitioner on 9th June 1997 at 21.00 hours in Parikshital Nagar caused injury by a knife and then taking out revolver like weapon he tried to aim at parietal region but those who had rushed there foiled his plan. When detailed enquiry was made into the matter, the Police Commissioner was satisfied that the petitioner was really the head-strong person, i.e., a tartar and his subversive activities were going berserk. No one was willing to lodge the complaint or make the statement as every one was feeling insecured. After considerable persuasion and when assurance was given that necessary particulars disclosing their identity would not be disclosed, some of the persons showed their willingness to make the statements. Their statements were recorded wherefrom it was clear that the petitioner being a head-strong person was extorting money and harassing the people by coercive measure and using the weapon he was having. To make the people feel free stern action was necessary but any action if taken under general law was found by the Police Commissioner to be unproductive as the law was not efficacious to curb the subversive activities of the petitioner. According to the Police Commissioner, the only way out was to pass the order of detention under the Act and detain the petitioner. Consequently, the order in question came to be passed and at present the petitioner is kept under detention.

3. On several grounds the petitioner has assailed the legality and validity of the order of detention. At the time of hearing before me, the learned advocates representing the parties tapered off their submissions confining to the only point namely exercise of privilege under Section 9(2) of the Act. I will, therefore, confine to that point alone going to the root of the case.

4. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating nondisclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and

should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

5. In view of such law, it was incumbent upon the Police Commissioner to file the affidavit and satisfy the court that it was absolutely necessary in the public interest to suppress the particulars of the witnesses and for that it was also necessary for him to make it clear in his affidavit what materials he considered, what factors were taken into account what inquiry he made and how non-disclosure was justified. It is pertinent to note that in this case no such affidavit is filed. It can, therefore, be assumed that without any just cause the privilege is exercised and necessary particulars are suppressed. For subjective satisfaction there is no application of mind. The petitioner was, in these circumstances, entitled to those particulars suppressed. For want of those particulars he could not make effective representation. When his right to make effective representation is thus impaired, his continued detention must be held to be illegal.

6. For the aforesaid reasons, this application is allowed. The order of detention dated 21st November 1997 is hereby quashed and set aside. The petitioner is ordered to be set at liberty forthwith if not required in

any other case. Rule accordingly made absolute.

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*(rmr).